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Decision

Matter of: Odin Construction Solutions, Inc.

File: B-419793; B-419793.2

Date: July 23, 2021

Daniel J. Foster, Esq., and Islam M. Ahmad, Esq., Wilke Fleury, LLP, for the protester. Jim Weiner, Esq., and Ryan A. Black, Esq., Department of the Interior, for the agency. Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency misevaluated proposals and treated offerors unequally is denied where the record shows the evaluation was reasonable, consistent with the evaluation criteria, and conducted in an equal manner.

DECISION

Odin Construction Solutions, Inc., a small business¹ of Rocklin, California, protests the award of a contract to EWS/RSCI, LLC, of Gillette, Wyoming, also a small business, under request for proposals (RFP) No. 140R4020R0015, issued by the Department of the Interior, Bureau of Reclamation, for the Big Sandy Dam Reservoir Enlargement Project, near Farson, Wyoming. Odin contends that its proposal was misevaluated and the agency made an unreasonable source selection decision.

We deny the protest.

BACKGROUND

The RFP, issued September 3, 2020, sought proposals from small businesses to perform various construction services over a 716-day performance period. The work was to include such things as the excavation and rehabilitation of existing dam and dike embankments, and the placement of concrete-encased canal outlet works pipe, cast-in-

¹ Odin represented that it was a small business at the time that it responded to the solicitation but it has not represented that it remains so now.

place concrete drop structures, and a cement-bentonite cutoff wall. Contracting Officer's Statement (COS) at 1.

Proposals would be evaluated under five factors: technical capability, technical plan, master plan, past performance, and cost/price. The non-price factors were approximately equal in importance and, when combined, were significantly more important than the cost/price factor. RFP at 72-73. However, the RFP indicated that the importance of cost/price "may increase with the degree of non-cost or non-price equality between the proposals." RFP at 72.

The first three factors were each divided into equally-weighted subfactors. As an example relevant to the protest, the master plan factor consisted of five subfactors: key personnel, management control, quality control plan, project schedule, and safety. RFP at 67-69. Taking into account all factors, the RFP provided that a contract would be awarded to firm whose proposal offered the best value to the agency. RFP at 72.

Interior received proposals from six offerors. After the initial evaluation, the contracting officer established a competitive range of the three most highly rated proposals, including those of EWS/RSCI and Odin. COS at 4. Interior conducted discussions and requested revised proposals from the competitive range offerors. The evaluation panel prepared an addendum to its original evaluation, explaining the nature of each offeror's revisions and the panel's consensus evaluation judgments concerning the strengths, significant strengths, and weaknesses of each proposal. The final evaluation produced the following adjectival ratings for the protester and awardee²:

Factor/Subfactor	EWS/RSCI	Odin
Technical Capability	Good	Good
Technical Experience	Outstanding	Good
Management Experience	Good	Good
Technical Plan	Good	Good
Technical Approach	Outstanding	Good
Major Subcontractors	Good	Good
Master Plan	Good	Acceptable
Key Personnel	Good	Acceptable
Management Control	Good	Good
Quality Control Plan	Good	Good
Project Schedule	Good	Acceptable
Safety	Acceptable	Acceptable
Past Performance	Exceptional	Satisfactory
Cost/Price	\$14.53 million	\$12.96 million

² Both Odin and EWS/RSCI were also rated low risk under the technical capability, technical plan, and master plan factors and each of their subfactors. The evaluation of the third competitive range offeror is not relevant here.

Agency Report (AR), Tab 11, Add. to Technical Proposal Evaluation Committee Report, at 1, 4-6.

The contracting officer reviewed the evaluation results and prepared a post-negotiation memorandum that discussed the significance of the evaluation and the differences in cost/price for each offeror. The contracting officer then documented a tradeoff judgment that the EWS/RSCI proposal provided the best value to the agency in comparison to the Odin proposal. The contracting officer's rationale explained that EWS/RSCI's advantages--particularly under the master plan and past performance factors--justified incurring its higher evaluated cost/price. After Odin received notice of the award and a debriefing, it filed this protest.

DISCUSSION

In the initial protest and first supplemental protest, which Odin filed after its counsel reviewed the evaluation record under a protective order issued by our Office, Odin raises challenges to multiple aspects of the evaluation of its proposal under the master plan and past performance factors. The firm also argues that the ratings were assessed unequally under the technical plan, master plan, and past performance factors, and that the contracting officer made an unreasonable tradeoff in selecting EWS/RSCI's proposal at its higher evaluated cost/price. As discussed below (using as examples one challenge under each of those factors), we conclude that the evaluation was reasonable and deny the protest.³

Technical Plan and Master Plan Factors

Where a protester challenges the evaluation of proposals, our Office's role is to examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. A protester's disagreement with the agency's judgment, by itself, is insufficient to show that the agency's judgment was unreasonable. *OHM Remediation Servs. Corp.*, B-274644 *et al.*, Dec. 23, 1996, 97-1 CPD ¶ 4 at 5. To demonstrate that an agency has treated offerors unequally in a technical evaluation, a protester must show that the differences in the competitors' ratings did not stem from differences between the proposals. *Raytheon Co., Space & Airborne Sys.*, B-411631, Sept. 16, 2015, 2015 CPD ¶ 361 at 8.

With respect to the technical plan factor, Odin challenges the evaluation under the technical approach subfactor, arguing that, even though both Odin and EWS/RSCI were evaluated as having a significant strength, the evaluation unreasonably and unequally rated Odin's proposal good and EWS/RSCI's proposal outstanding. Comments at 5-6; Supp. Protest at 10-11.

³ As we discuss below, Odin's second supplemental protest was not timely filed.

Interior disputes the protester's characterization of the evaluation as basing EWS/RSCI's outstanding rating on the identification of a significant strength. Supp. Contracting Officer's Statement (COS). The agency states that the evaluators assessed all the identified strengths of each proposal under the technical approach subfactor and found that they supported a rating of outstanding for the EWS/RSCI proposal because of its more extensive strengths and significant strengths, whereas Odin's more limited strengths and single significant strength merited a rating of good. Supp. COS at 4.

The evaluation record shows that, in reviewing Odin's proposal, the evaluators concluded that the detailed information the firm provided regarding its [DELETED], should be "considered significant strengths." AR, Tab 11, Add. to Technical Proposal Evaluation Committee Report at 7. The agency also concluded that the Odin proposal had multiple strengths and that those strengths, combined with a significant strength for one aspect of the work, merited a rating of good. Supp. COS at 4-6. The evaluation of EWS/RSCI's proposal, however, identified multiple significant strengths based on the firm's detailed approach to [DELETED]. *Id.* at 4-5. Our review of the record shows the agency had a reasonable basis to assess different ratings under the technical approach subfactor based on the more extensive strengths and significant strengths identified in EWS/RSCI's proposal. As a result, we deny these protest allegations.

Odin raises multiple challenges with respect to the evaluation under the master plan factor. For example, the protester contends that the evaluation under the safety subfactor was unreasonable because both firms received the same ratings of acceptable even though Odin had a superior safety record. Odin also contends that the rating of acceptable for EWS/RSCI was unreasonable because a weakness that the firm did not adequately resolve remained in its proposal, while Odin should have received a rating of good because no weaknesses remained in its revised proposal under the safety subfactor. Supp. Protest at 10-11.

Interior argues that Odin improperly attempts to reduce the evaluation to a comparison on narrow criteria where the protester claims to have an advantage, rather than recognizing the evaluators' reasoned judgment overall. Supp. COS at 10-11. The agency acknowledges that Odin's current safety rating was graded superior, in contrast to a fair rating for EWS/RSCI, but emphasizes that both firms' safety ratings met the RFP standard. The agency also contends that Odin's safety record is not clearly better than EWS/RSCI's, and that reviewing each firm's ratings shows that on average EWS/RSCI's safety ratings are slightly more favorable than Odin's. *Id.* at 11. Altogether, the agency contends that the record supports the reasonableness of the evaluation under the safety subfactor.

In our view, the record provides a reasonable basis for the evaluation of both firms' proposals under the safety subfactor. Although Odin contends that its record is superior, it has not shown that the differences in the two firms' records are so significant that Interior could not reasonably assign the same rating to both firms. Instead, Interior has shown that both firms met the RFP standard and adequately addressed safety both in their proposed approaches to the work and in their safety records. Additionally, our

review does not support Odin's claim that a safety weakness remained in the EWS/RSCI proposal under this subfactor. Instead, the contemporaneous evaluation record directly states, and our review supports, that there were no unresolved weaknesses in the EWS/RSCI proposal in the agency's final evaluation under the safety subfactor. See AR, Tab 11, Add. to Technical Proposal Evaluation Committee Report, at 5-6 ("All weaknesses have been satisfactorily addressed. There were no significant weaknesses or deficiencies [for EWS/RSCI under the safety subfactor]").

Past Performance Factor

Odin contends that the record does not support Interior's assessment that EWS/RSCI merited a higher past performance rating based on a superior record of performance; instead the protester contends that both firms should have received the same rating. Odin argues that its lower rating was unreasonable because Interior emphasized negative aspects of its performance record and disregarded both positive information regarding the same issues and the fact that references indicated they would recommend Odin for additional work in the future. Supp. Protest at 17-22.

Interior contends that the record supports the reasonableness of its evaluation. In particular, the agency argues that the record of Odin's past performance showed two contracts for which some aspects of Odin's performance had been rated merely satisfactory. Supp. COS at 12. Given that performance record, the agency argues that assessing a higher rating for Odin would have been inconsistent with the evaluation scheme. In contrast, the agency contends that EWS/RSCI's performance record consisted of ratings of outstanding/exceptional and better/very good. The only exception was one rating of neutral that the contracting officer explains did not weigh positively or negatively because it appeared that the respondent viewed the criterion as inapplicable.⁴ Supp. COS at 12. Interior thus contends that the exceptional past performance rating for EWS/RSCI was reasonable and supported by the record.

Where a protester challenges the evaluation of past performance, our Office will review the agency's evaluation but will not sustain the protester's challenge unless the record shows the evaluation to be unreasonable, inconsistent with the solicitation criteria, or undocumented. *EFW, Inc., B-418177 et al.*, Jan. 21, 2020, 2020 CPD ¶ 124 at 9. Our review of the record supports Interior's judgment that EWS/RSCI had a uniformly more positive record of past performance than Odin.⁵ In particular, the past performance

⁴ The rating at issue was cost control on a contract that was identified as being unit priced. AR, Tab 14, EWS/RSCI Past Performance Reports at 10.

⁵ Odin also argues that its past performance rating of satisfactory was the result of the agency assessing a weakness that it improperly failed to allow Odin to address. This argument lacks a factual basis. Odin has not shown that Interior assessed the firm's past performance as having a weakness, significant weakness, or deficiency, but instead engages in fallacious reasoning that in order for its past performance to have received a rating of satisfactory, Interior must have considered one aspect of the firm's

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reports for EWS/RSCI support the agency's view that the firm's past performance was comparable to the work required under the RFP and the firm's performance on them was described consistently as better/very good or outstanding/exceptional. See *generally*, AR, Tab 14, EWS/RSCI Past Performance Reports. In contrast, Odin's past performance, while also relevant, showed two contracts where the firm's performance was deemed merely satisfactory in two areas. AR, Tab 13, Protester's Past Performance Reports, at 1, 6-9, 18, 20. The record thus provides reasonable support for Interior's evaluation judgment regarding both firms' past performance.

Untimely Second Supplemental Protest

In its second supplemental protest, Odin contends that the evaluation under the technical plan factor was based on a simple comparison of the number of strengths assigned to each offeror's proposal. Having made that assertion, Odin contends that the evaluation under the master plan factor and its management control subfactor should also have been based on counting the number of strengths and significant strengths assessed, with more strengths dictating higher ratings. Second Supp. Protest at 8-9. Since its proposal was assessed more strengths than EWS/RSCI's under this factor and subfactor, Odin contends that Interior improperly rated its proposal acceptable and EWS/RSCI's proposal good. *Id.*

Our Office questioned whether Odin's challenges were timely as the ratings and the evaluators' supporting narratives had been released to Odin's counsel (under our protective order) in the initial agency report. Thus, Odin's counsel had the facts underlying its challenge more than 10 days before filing the second supplemental protest. In response, Odin's counsel contends that the protest was timely because only in the supplemental agency report did Interior reveal that the evaluation under the technical plan factor was allegedly conducted by counting the number of strength and significant strengths, and assigning a higher rating to the offeror with the most strengths and significant strengths. Odin contends that until the supplemental contracting officer's statement revealed what it alleges was the actual evaluation method for the technical plan factor and its subfactors, Odin had no reason to raise the new challenges.

We dismiss the second supplemental protest as untimely. Under our Bid Protest Regulations, a protest involving other than an alleged impropriety in a solicitation which is apparent prior to the time set for the receipt of proposals must be filed not later than 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). Through its counsel reviewing the evaluation record in the initial agency

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past performance reported in the contractor performance assessment reporting system as constituting a weakness. The protester's unsupported hypothesis is inadequate to constitute a basis of protest, and the record does not provide factual support for the claim that Odin's past performance evaluation was based on a weakness, significant weakness, or deficiency.

report, Odin knew the basis for Interior's evaluation of its proposal. If Odin believed its ratings were unreasonable or inconsistent with the solicitation, it knew or should have known the basis for its challenge from the initial agency report. Indeed, even if we accept, for the sake of argument, Odin's contention that the evaluation under the technical plan factor was actually based on a mechanical comparison of the number of strengths and significant strengths, Odin's advocacy for a mechanical comparison under a separate evaluation factor provides us with no basis to sustain its protest.⁶

Source Selection Decision

Finally, Odin contends that Interior failed to set forth a reasonable basis for incurring the additional cost of approximately 12 percent associated with selecting EWS/RSCI's proposal. Protest at 7, 10; Supp. Comments at 6-7.

Interior responds that the solicitation provided that the non-price factors, when combined, were more important than cost/price, and the agency argues that the contracting officer expressly recognized the additional cost associated with selecting EWS/RSCI's proposal over Odin's and employed business judgment in determining that the additional cost was justified by the evaluated advantages of selecting EWS/RSCI for award. Memorandum of Law (MOL) at 4; AR, Tab 12, Post-Negotiation Memorandum at 11. The agency contends that the source selection rationale discusses the evaluated advantages of EWS/RSCI's proposal and demonstrates that the contracting officer had a reasonable basis on which to make a reasonable tradeoff judgment in favor of the awardee's proposal. MOL at 4; AR, Tab 12, Post-Negotiation Memorandum at 9-11.

Where a protester challenges the selection of a higher-priced proposal that has been rated technically superior to the protester's lower-priced but acceptable one, our Office will review the record to assess whether the award decision is supported by a rational explanation of why the higher-rated proposal is, in fact, superior, and explaining why its technical superiority warrants paying a price premium. *J.R. Conkey & Assocs., Inc.*, B-406024.4, Aug. 22, 2012, 2012 CPD ¶ 241 at 9. A protester's disagreement with the agency's determinations as to the relative merits of competing proposals, or

⁶ Such an argument, if timely, is legally insufficient because adjectival ratings are only guides to intelligent decision-making. See *Southwind Constr. Servs., LLC*, B-410333.2, Jan. 21, 2015, 2015 CPD ¶ 64 at 6 ("Generally, when a protester's challenge to a source selection decision is based solely on the number of evaluated strengths, weaknesses, or other discriminators identified by an agency during its evaluation, the challenge fails to state a valid protest basis since a contracting agency's ratings, be they numerical, adjectival, or color, are guides to intelligent decision making"). Even if doing so would have favored Odin under the master plan factor and its subfactors, the evaluation process is not simply a matter of mechanically counting the assigned strengths (or weaknesses), but rather must qualitatively assess the relative technical merit of the proposal. *Id.* Odin's contention that it should have been assigned a higher adjectival rating is an insufficient basis for protest.

disagreement with its judgment as to which proposal offers the best value to the agency, does not establish that the source selection decision was unreasonable. *HGS Eng'g, Inc.; Am. Commercial Grp., Inc.*, B-412042, B-412042.2, Dec. 10, 2015, 2015 CPD ¶ 390 at 4.

The contemporaneous documentation of the source selection judgment provides a reasonable basis for the selection of EWS/RSCI's higher-cost proposal. The contracting officer identified specific areas where EWS/RSCI's proposal demonstrated advantages. Those included its extensive experience in [DELETED], its broad experience and detailed procedures for [DELETED], its use of specific techniques for [DELETED], and the highly [DELETED] on the project. AR, Tab 12, Post-Negotiation Memorandum at 9-10. Based on the advantages that EWS/RSCI provided by those specific significant strengths, the contracting officer determined that the additional cost of awarding the contract to EWS/RSCI was justified. *Id.* at 11. In our view the record properly documents the basis for the contracting officer's tradeoff decision.

The protest is denied.

Thomas H. Armstrong
General Counsel